IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SECOND APPEAL No 72 of 2000

For Approval and Signature:

Hon'ble MR.JUSTICE D.P.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

HOTHI JUSAB MITHU

Versus

LEGAL HEIRS OF GABHA BACHU CHAVDA

Appearance:

MR EE SAIYED for Petitioner

MR KV SHELAT for Respondent No. 1

CORAM : MR.JUSTICE D.P.BUCH

Date of decision: 05/02/2001

ORAL JUDGEMENT

This Second Appeal has been filed against the judgment and decree dated 7.7.2000 recorded by the learned Joint District Judge at Gandhidham in Kachchh District in Regular Civil Appeal No.1/99, under which the learned Judge dismissed the said appeal of the present appellant.

2. The said appeal was preferred by the present appellant before the District Court at Gandhidham against the judgment and decree dated 20.7.1987 recorded by the learned Civil Judge (JD), Anjar in Kachchh District in Civil Suit No.140/82, under which the learned trial Judge passed the decree in favour of the respondent-original plaintiff and directed the present appellant-original defendant to hand over possession of the property in question to the present respondent-original plaintiff.

3. The predecessor of the present respondent, deceased Gabha Bachu Chavda instituted Regular Civil Suit No.140/82 against the present appellant stating that he is the owner in respect of the property in question and that the present appellant-original defendant had committed encroachment and trespass in respect of the said property. Therefore, the deceased plaintiff filed aforesaid suit for possession of the property in question. The appellant-above named, had taken up a contention in the said suit that he was tenant in respect of the said property. The trial court raised necessary issues and after providing opportunity to the parties, the trial court came to a decision that the present appellant-original defendant was trespasser in respect of the property in question. The trial court also recorded finding that the present appellant has failed to prove that his father was tenant in respect of the said property. Consequently, on arriving at the aforesaid finding, the trial court decreed the suit of the respondent and directed the present appellant to hand over vacant possession of the property in question to the deceased plaintiff. Feeling aggrieved by the said judgment and decree of the trial court, the present appellant preferred Regular Civil Appeal No.1/99 before the District Court, Gandhidham in Kachchh district. Learned Joint District Judge heard the parties and dismissed the appeal of the present appellant by judgment and decree dated 7.7.2000. Feeling aggrieved by the said judgment and decree of the District Court, the appellant has preferred this appeal before this Court, being Second Appeal, under section 100 of the Code of Civil Procedure, 1908. Therefore, it is necessary for the appellant to show that the appeal is entertainable within four corners of section 100 of the Code of Civil Procedure, 1908 (for short, 'the Code'). It would be worthwhile to refer to the provisions made in section 100 of the Code. The same is reproduced for ready reference as follows:

"100. SECOND APPEAL - (1) Save as otherwise expressly provided in the body of this Code or by

any other law for the time being in force, an appeal shall lie to the High Court from every decree passed in appeal by any Court subordinate to the High Court, if the High Court is satisfied that the case involves a substantial question of law.

(2) An appeal may be under this section from an appellate decree passed ex parte.

(3) In an appeal under this section, the memorandum of appeal shall precisely state the substantial question of law involved in he appeal.

(4) Where the High Court is satisfied that a substantial question of law is involved in any case, it shall formulate that question.

(5) The appeal shall be heard on the question so formulated and the respondent shall, at the hearing of the appeal, be allowed to argue that the case does not involve such question:

Provided that nothing in this sub-section shall be deemed to take away or abridge the power of the Court to hear, for reasons to be recorded, the appeal on any other substantial question of law, not formulated by it, if it is satisfied that the case involves such question."

On a bare reading of the aforesaid provisions of section 100 of the Code, it is very clear that Second Appeal would lie to the High Court from every decree passed in appeal by any court subordinate to the court. Sub-section (4) of section 100 of the Code further shows that when the High Court is satisfied that a substantial question of law is involved in any case, it shall formulate that question. Therefore, firstly, it is incumbent upon the appellant to show that a substantial question of law has been involved in this Second Appeal. The High Court has to get itself satisfied about the involvement of such a substantial question of law. In any case, the Second Appeal cannot be entertained unless the High court is satisfied that there is substantial question of law involved in the case and it is further required that the High Court must formulate such question which can be said to be substantial question of law.

4. Therefore, a query was made to the learned Advocate for the appellant to show as what substantial

question/s of law has/have arisen which requires determination by this court. At this juncture, learned Advocate for the appellant has formulated following three points and has argued that these are the questions of law which should be treated to be substantial questions of law within the meaning of Section 100 of the Code. These points can be reproduced hereunder for ready reference:

"8. Whether in the facts and circumstances of the case the Order/s passed by the courts are without jurisdiction in view of the fact that the defendant have claimed their rights as tenants and therefore, only the Tenancy Courts have jurisdiction to try the case and not City Civil Court?

9. Whether both the Courts below have wrongly come to the conclusion that the defendants have broken the locks of the suit premises and entered as trespassers?

10. Whether in the facts and circumstances of the case the Courts below have wrongly come to the conclusion that the father of the defendants was not a tenant in 1968."

It has been argued that the appellant had contended before the trial court that the appellant was a tenant. That therefore, the Civil Court could not entertain the suit of the deceased plaintiff. Now, when the plaintiff goes to Civil Court, and proves that he is the owner of the property and the defendant has committed trespass in that property, then on the proof of the said fact, the Civil Court can certainly entertain the suit and it can further pass decree for eviction of trespasser defendant from the said property. Simply because the defendant raise a contention that he is the tenant in respect of the said property, the Civil Court does not have to raise its hands and it has not to direct the plaintiff to go to the rent court constituted under Section 28 of the Bombay Rents, Hotels and Lodging Houses (Rates) Control, 1947. Therefore, it cannot be said that simply because the defendant had raised a contention that he is a tenant in respect of the property in question, the Civil court had no jurisdiction to entertain the suit. This question has been gone into by the two courts below and both the courts have recorded concurrent finding of fact. Even I am of the clear decision that the said finding of fact is not illegal. Had it been the contention in the plaint that the defendant is a tenant or that his father was a tenant, then the position would have been different. It

is well settled that for the purpose of ascertaining the question of jurisdiction, the Court has to look into the allegations and averments made in the plaint and the court cannot look into the contention raised by the defendant in the written statement. Once this legal position is borne in mind, it is very clear that in the present case, it is nowhere alleged or averred in the plaint that the defendant or his father was a tenant of the property in question. Therefore, there was no question for deceased plaintiff to go to the rent Court constituted under section 28 of the Act. Therefore, it cannot be said that the Civil Court had no jurisdiction to entertain the suit. Therefore, there is no jurisdictional error committed by the two courts below. In other words, the decree passed by the Civil Court and confirmed by the District Court cannot be considered to be illegal from jurisdictional angle as discussed hereinabove. In view of the above, I am of the clear decision that the decree of the two courts below cannot be treated to be illegal on the aforesaid consideration.

5. It has, then been contended that both the courts below have wrongly come to the conclusion that the defendant has broken when the lock of the suit premises and entered therein as a trespasser. The two courts below have recorded concurrent finding of fact on this issue. The Civil Court has found on appreciation of evidence before it that the defendant had committed trespass in respect of the property in question by breaking open the lock. The District Court again came to the same finding that the defendant had committed trespass by breaking open the lock. Therefore, there are concurrent finding of fact by the two courts below on appreciation of evidence adduced before the courts below. Learned Advocate for the appellant has argued at length that the two courts below have committed error in appreciation of evidence. This would mean that he requires this court to reappreciate the evidence. This is impermissible. Whether or not the defendant is a trespasser in respect of a particular property, is again a question of fact, which has to be decided by the Civil Court and by appellate court by appreciation of evidence. When the two courts have recorded concurrent finding of fact that the appellant-original defendant was a trespasser, then in that event, it is not open to this court to reappreciate the evidence to hold that the findings are wrong and are illegal. Therefore, this court cannot undertake the process of reappreciation of evidence when the two courts below have recorded concurrent finding of fact that the appellant-original defendant was trespasser of the property in question.

Again this is a question of fact and not a question of law. Therefore, on both the aspects, it cannot be said that question of law has been involved in the matter and, therefore, the High court should entertain the Second Appeal. Therefore, this issue cannot be treated to be a substantial question of law as suggested by the learned Advocate for the appellant.

6. The Learned Advocate for the appellant has also argued that the courts below have wrongly come to the conclusion that father of the defendant was not a tenant. Again this is a question of fact which is discussed and decided by both the courts below against the interest of the present appellant. This finding of fact has been concurrently recorded by the two courts below and on the same line of reasoning. It cannot be said that substantial question of law is involved in the present appeal on this aspect of the case. This point has also been discussed and decided on appreciation of evidence and again there cannot be reappreciation of evidence on the issue of fact. This court cannot again undertake the process of reappreciation of evidence on a question of fact. Therefore, I am of the view that this question which has been formulated by the learned Advocate for the appellant are questions of fact based on appreciation of evidence on factual aspects and not questions of law, and, therefore, when the questions of facts are involved and no question of law is involved, then in that event, looking to the bare reading of section 100 of the Code, this appeal is not entertainable.

7. The learned Advocate for the appellant has relied upon a decision of this court in the case of Govindbhai v New Shorrock Mills, Nadiad (AIR 1984 Guj.182). There the courts below considered a document to be a document of licence and this court, on interpretation thereof found that this was not a document of licence but a document of lease. Such a document was not required to be interpreted either by the Civil Court or by the District Court. Even this court is not required to interpret such a document. There, it was not a question of reappreciation of factual data, it was simply a matter of interpretation of a document. This court had interpreted the said document as document of lease and, therefore, it was held that the courts below had committed illegality in treating the document to be a document of licence and consequently the judgment and decree passed by the District Court confirming the judgment and decree of the Civil Court were reversed in the said Civil Revision Application, by this court. Moreover, there is a recent decision of the Apex Court wherein it has been laid down

that the Second Appeal is not tenable unless substantial question of law has been involved. Moreover, a Second Appeal has to be heard and disposed of as Second Appeal and it cannot be heard and disposed of as a First Appeal. Further, the aforesaid decision of this court was an outcome of the Civil Revision Application under Section 115 of the Code of Civil Procedure as well as under section 29 of the Bombay Rent Act. This is after all a Second Appeal filed by the appellant under section 100 of the Code, which positively requires involvement of substantial question of law. In any case, I find that the above referred issues are not substantial question of law. They are ultimately based on facts and not based on issues of law. Therefore, in my opinion, no substantial question of law is involved in the matter and consequently, the Second Appeal is without any merit and is required to be dismissed at the admission stage itself. In other words, no substantial question of law has been involved in this Second Appeal and, therefore, there is no question of admitting the appeal. In the facts and circumstances of the case, this appeal is ordered to be dismissed at the admission stage. However, the appellant is given three months time for vacating the property in question. Consequently the judgment and decree of the trial court shall not be executed against the appellant with respect to his possession for a period of three months from today. Notice discharged.

5.2.2001 [D P Buch, J.]
msp.